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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 774

COUNTY OF ALLEGHENY,

Petitioner,

vs.

MARYLAND CASUALTY COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of County of Allegheny, a political subdivision of the Commonwealth of Pennsylvania, respectfully represents:

Statement of the Matter Involved.

[References such as (R. b), (R. 9), (R. 1806), etc., are to pages of the printed Appendix for Appellant below. References such as (R. 45a), (R. 50a), etc., are to pages of the printed Appendix for Appellee below, as supplemented by the additional proceedings below.]

(1)

In an action laid on a $200,000 surety bond (R. 9) and tried by a jury in the United States District Court for the Western District of Pennsylvania, petitioner recovered a verdict and judgment (R. 1806) against respondent for $251,266.67, the full amount of the bond with interest. Thereafter, respondent moved (R. 2153) under Civil Procedure Rules 50 and 59 for a judgment and, in the alternative, for a new trial. The trial court (R. 2166) thereupon vacated petitioner's verdict and entered judgment for respondent, but it failed to act upon respondent's alternative motion for new trial. Calling the decision of this Court in *Montgomery Ward* v. *Duncan,* 311 U. S. 243 (1940) to its attention, petitioner then moved the trial court (R. 2166) to vacate its judgment and to proceed to make complete disposition of respondent's entire motion. The trial court thereupon (R. 2173) vacated its judgment. Subsequently, by the entry of separate orders (R. 2176-7), both dated November 15, 1941, the trial court re-entered judgment against petitioner and also granted respondent's alternative motion for new trial.

Petitioner appealed (R. 2181) to the United States Circuit Court of Appeals for the Third Circuit from the final judgment so entered against it. The Circuit Court avoided decision on the merits of the appeal by holding (R. 49a), purely *suo moto,* that the grant of the motion for new trial, alternative to the motion for judgment, had operated in law to vacate the simultaneously entered judgment because the trial court had not expressly conditioned the grant to be effective only upon a reversal of the judgment on appeal. Thus concluding the appealed judgment to be non-existent, the Circuit Court dismissed petitioner's appeal (R. 54a).

Petitioner avers that, as a matter of law, such conditional effectiveness of the grant was implicit in the order of the

trial court and was not required to be expressly stated. Petitioner, therefore, avers existence of the appealed judgment and assigns the dismissal of its appeal as error. By reason of other facts hereinafter stated, petitioner avers that the record in this action is such that a consideration of the merits of its appeal either by the Circuit Court or by this Court could and should properly result in a restoration of its verdict and judgment as free from harmful error and as constituting a legally correct final determination of the rights of the parties on the issues joined.

(2)

In its notice of appeal (R. 2181), petitioner specifically designated the final judgment as the order appealed from and then gave further notice that, "in this appeal from said final judgment", it would also seek a review and reversal of the order granting the new trial, which, as has been stated, was an order in grant of respondent's alternative motion. Petitioner avers that said further notice did not constitute an appeal from said order but was merely an assertion of an intended claim of procedural right with respect thereto. In its statement of points intended to be relied upon (filed under Civil Procedure Rule 75(d)), petitioner stated a point (R. 2182) to the effect that, if the judgment appealed from were found to be error, the grant of new trial in the alternative was *reviewable* because its underlying grounds were solely matters of law. In immediately subsequent points (R. 2183), petitioner attacked each reason separately as constituting an abuse of judicial discretion and stated supporting detail. The reasons will be hereinafter analyzed and explained in their relation to the facts of the case.

Prior to a hearing of petitioner's appeal, respondent moved (R. 43a) the Circuit Court "to dismiss that part of the appeal herein seeking a review, etc." upon the ground

that the order "granting a new trial" was not a final decision within the statutory jurisdiction of the Circuit Court and was "not appealable". In answer (R. 45a) to the motion, petitioner contended that it had not *appealed* from any order granting a new trial but merely sought a review of the order below granting respondent's alternative motion as properly incidental to a determination of the character of mandate appropriately issuable by the Circuit Court in the event it reversed the appealed judgment after hearing the appeal. By an order (R. 47a) entered June 2, 1942, unsupported by any opinion, the Circuit Court granted respondent's said motion. Petitioner avers that said order was and is an absolute nullity in law and without any force or effect whatsoever in this action, for the reason that it purports to dismiss an appeal which in fact never existed and does not exist.

The final order of the Circuit Court, entered on January 22, 1943, (R. 54a) ordered and adjudged "that the appeal from the orders of November 15, 1941, of the said District Court in this case be, and the same is hereby dismissed, with costs". It will be noted from the language of said final order that it dismiss petitioner's appeal as one from the "orders" of the trial court dated November 15, 1941, and not as one solely from the order of that date which entered the judgment actually appealed from. Insofar as said final order purports to dismiss an appeal by petitioner from the order of November 15, 1941, in grant of respondent's alternative motion for new trial, petitioner assigns error thereto upon the ground that no such appeal exists in fact in this case.

Petitioner avers that it was under no duty to petition this Court for certiorari for a review of the order of the Circuit Court dated June 2, 1942. Any such application made prior to a final decision of petitioner's appeal by the Circuit Court could have called for nothing more than an advisory

opinion of this Court based upon a mere conjecture that the appeal might result in a reversal of the appealed judgment by the Circuit Court. The entry by the Circuit Court of its final order of January 22, 1943, in form and substance as above stated, relieves this situation and makes appropriate the review thereof now sought by this petition.

Petitioner avers that, if this Court grants certiorari upon this petition, this Court has adequate power to declare the ineffectiveness of both of said orders in the circumstances. Petitioner further avers that, if a consideration of the merits of its appeal either by this Court or by the Circuit Court results in a reversal of the judgment appealed from, it will become the duty of the court under the law to review the grant by the trial court of respondent's alternative motion for new trial, in the peculiar circumstances of its underlying reasons, as in determination of the character of its appropriate mandate.

(3)

Respondent's bond (R. 9) was conditioned for faithful performance of a contract of sale (R. 12) of 1100 voting machines purchased by petitioner from respondent's principal, Poole Engineering & Machine Company, at a total price of $1,120,900, which was paid in full by petitioner. By its complaint (R. 3), petitioner alleged three different varieties of breach of performance of the sales contract: (1) breach of an implied warranty of fitness for purpose; (2) breach of certain express warranties that the machines would be constructed so as to permit the performance of certain acts and to preclude performance of certain other acts; and (3) breach of a particular promise (designated hereinafter for convenience as the "5-year promise") which required the vendor (R. 13, paragraph "Fourth") "to make such alterations, repairs, replacements, etc., in accordance with the specifications", Article 12 (R. 23) of which required the vendor to "make good by repair or

replacement, any imperfections or defects in the material, mechanism or workmanship in any and all machines purchased" for a period of five years without cost to petitioner.

By a schedule (R. 26) attached to the complaint, petitioner (1) specified the breached express warranties and (2) particularized the imperfections and defects in the material, mechanism and workmanship subject to the performance of the "5-year promise",—these same defects being there alleged as the underlying factors in causation of the alleged breaches of warranties. Petitioner further alleged (R. 5) these particularized defects to have been latent and undiscoverable by plaintiff when the machines were delivered, accepted, and paid for, and to have become known to petitioner only in course of time thereafter by and through their use.

The same identical damages were claimed (R. 7) as consequential to each of the three alleged varieties of breaches of performance of the sales contract. Otherwise stated, petitioner claimed to have been damaged by breach of the condition of the bond in a single sum as consequential to any one of the three alleged breaches of performance of the sales contract or as consequential to all of them together.

The verdict established proof of damages to the full amount of the bond in consequence of breaches of performance of the sales contract as regards the implied warranty and the express warranties. If the proper scope of the "5-year promise" is determined to be as contended for by petitioner and not as limited by the trial court (a matter hereinafter explained), the verdict establishes proof of damages to the full amount of the bond in consequence of breach of this promise also.

To the branches of petitioner's claim based upon alleged non-performance by respondent's principal of its contractual warranties, expressed and implied, respondent raised an affirmative defense of *res judicata,* to which peti-

tioner replied by order (R. 78) of the trial court. The issues raised by the complaint, this affirmative defense (R. 64), and the reply thereto (R. 79), were issues of fact and of law. The case relied upon by respondent as rendering said branches of petitioner's claim *res judicata* was *Bassett* v. *Armstrong,* 309 Pa. 296. The record in said case (R. 1917-2150) was admitted in evidence over petitioner's objection (R. 1754-6 and R. 1784) and went to the jury along with all of the other evidence in the case when the trial court refused respondent's request for charge to the effect that it barred a recovery by petitioner as respects said branches of its claim (R. 1795 and R. 1804). Disregarding the verdict as a finding for petitioner upon the issues of fact involved in the *res judicata* defense, the trial court changed its mind upon the matter involved in the refusal of the request and entered the judgment appealed from upon a determination (R. 2154) that, as a matter of law, said branches of plaintiff's claim were *res judicata* by said case. In its statement of points relied upon in its appeal, petitioner assigned said action of the trial court as reversible error (R. 2182).

Petitioner's evidence going to the branch of its claim relating to breach of performance of the "5-year promise" was offered and received in conjunction with the evidence relating to the other branches of its claim (see typical offer, R. 381-3). Said evidence went to the jury under a charge (R. 1785, R. 1795-6) construing the "5-year promise" to be limited to maintenance of the machines in their original condition as delivered. Petitioner excepted specially to the charge in said respect (R. 1800). In stating the measure of damages occasioned by such breaches of its "obligations under the contract" as the jury should find Poole had committed, the trial court (R. 1792) charged the jury that if it found for petitioner it should determine the amount petitioner "was fairly required to pay, not to reconstruct new machines, but to repair and recondition the

old machines so that they would meet the requirements of the sales contract, with its specifications". The verdict (R. 1806) was a general one. In entering the judgment for respondent after the verdict, the trial court concluded (R. 2163-4) that the testimony contained no evidence of "expense to the county for the restoration or repair of any ailing part" and, construing the obligation of Poole under its contract to be limited to the "repair" or "replacement" of original parts in the original machines, it found respondent entitled to judgment insofar as petitioner's claim of breach in performance of the sales contract in the respect now being discussed was concerned. No request for binding instructions upon this specific ground had been made or presented prior to the receipt of the verdict. In its statement of points relied upon in its appeal, petitioner assigned said action of the trial court as reversible error (R. 2182). Petitioner avers that the "5-year promise", properly construed under the law, required the vendor to make good, by alterations, repairs, and replacements, any imperfections or defects in the material, mechanism, or workmanship that developed in the machines within a period of five years from the date of their purchase.

The reasons expressly stated by the trial court in its opinion supporting its grant of respondent's alternative motion for a new trial (R. 2174) were substantially as follows:

> (1) That, as one rendered in respect of the branches of petitioner's claim of non-performance of the express and implied warranties, the verdict is against the law,—this by reason of supposed error in the refusal of respondent's request for charge that the claim in those respects was *res judicata* by *Bassett vs. Armstrong.*
>
> (2) That, as one rendered in respect of the branch of petitioner's claim of non-performance of the "5-year

promise", the verdict is against the evidence. This conclusion, however, is expressly made dependent and conditional upon the rectitude of the opinions (R. 2163-4, R. 2172, R. 2174) and the charge of the trial court respecting the scope of the promise. And the effectiveness of the entire reason is also expressly conditional upon the supposition of rectitude in the conclusion that the branches of petitioner's claim relating to the express and implied warranties are *res judicata* by *Bassett vs. Armstrong.*

(3) That "certain testimony" admitted in evidence could have no probative value upon the issues of breach of contract because the same evidence could support a conviction for violation of certain criminal sections of the Pennsylvania Voting Machine Act of 1929, P. L. 549, and "in this same connection" the trial court had refused respondent's requests No. 17 (R. 1805), No. 18 (R. 1805), and No. 19 (R. 1796); the last of which, however, it had not refused but had affirmed and read into the charge (R. 1796).

The first two of said reasons are substantially the same reasons upon which the trial court entered the judgment appealed from, and the third reason is purely a matter of law. Petitioner avers that all of said reasons are merely judicially supposed trial errors and that petitioner's verdict and judgment are totally free of any actual trial error harmful to respondent.

At the conclusion of all the evidence, respondent submitted a number of writen requests for jury instructions, among which was a request that respondent "is entitled to have a verdict directed in its favor, dismissing the complaint" (R. 1805). This request was refused (R. 1798). Neither before nor during the submission of the case to the jury did the trial court make any express reservation of any question as to the legal sufficiency of the evidence to support a verdict for petitioner. Nor did respondent move

for a directed verdict stating "the specific grounds therefor" under the provisions of Civil Procedure Rule 50 (a). After rendition of the verdict, respondent filed its motion (R. 2113) wherein, after reciting that "a motion for a directed verdict made by the defendant at the conclusion of all the evidence having been denied," respondent "pursuant to Rule 50 of the Federal Rules of Civil Procedure," moved "to have the aforementioned verdict and the judgment entered thereon set aside, and to have a judgment entered in accordance with its said motion for a directed verdict." With the record in this state, the trial court entered the judgment appealed from. In its statement of points relied upon in its appeal, petitioner asserted the entry of the judgment under these circumstances to have been in violation of petitioner's rights under the Rules of Civil Procedure and the Seventh Amendment to the Constitution of the United States, and, hence, reversible error (R. 2184).

In its brief in support of its appeal to the Circuit Court, petitioner stated and argued the following questions:

> (1) Are the branches of petitioner's claim based upon non-performance by respondent's principal of its contractual warranties expressed and implied *res judicata* as a matter of law notwithstanding the verdict as one rendered in respect thereof?
>
> (2) Is the verdict without legally sufficient support as one rendered in respect of the branch of petitioner's claim based upon non-performance by respondent's principal of its contractual "5-year promise"?
>
> (3) If the appealed judgment is reversed, has the Court the power, in determination of the appropriate nature of its mandate, to review the alternative award of new trial in the peculiar circumstances of this case? If so, does the award constitute an abuse of judicial

discretion in the circumstances of its underlying reasons?

(4) Was the appealed judgment entered in violation of petitioner's rights under the Seventh Amendment to the Constitution of the United States and the Federal Rules of Civil Procedure?

Petitioner avers that, if this Court grants certiorari upon this petition, this Court has adequate power and authority under the law to determine all of said questions or to order them to be determined by the Circuit Court below.

(4)

By its amended complaint in the District Court and appropriate process (R. b), petitioner brought upon the record an added party defendant, Home Indemnity Company, against whom a claim for relief (R. 9) was stated upon an additional $425,000 bond (R. 1831) upon which it is surety and which is conditioned in certain respects concerning the same voting machines and the same contract of sale. Petitioner averred damages greater than the combined amounts of the two bonds and sought relief against Home Indemnity Company on its bond in the event of a successful recovery to the full extent of respondent's bond. However, the count against Home Indemnity Company was dismissed by the District Court without prejudice to the right of petitioner to bring another action against Home Indemnity Company upon its bond after a recovery from respondent of the full amount of respondent's bond by payment or judgment (R. c).

Petitioner, being a component part of the public, accordingly avers that it is peculiarly in the public interest that the litigation in the instant case be determined with all possible speed consistent with the procedural rights of respondent and the law.

Jurisdictional Statement.

(1) Petitioner bases the jurisdiction of this Court to entertain and grant this petition upon the provisions of Section 240 of the Judicial Code, as amended, 28 U. S. C. A. § 347.

(2) The Circuit Court below dismissed petitioner's appeal on January 22, 1943.

Questions Presented.

The questions intended to be presented by this petition are the following:

(1) Did the trial court's order of November 15, 1941, in grant of respondent's alternative motion for new trial operate in law to vacate the judgment entered by its other order of the same date?

(2) Did petitioner appeal from both orders of the trial court dated November 15, 1941? Did not petitioner, rather, appeal solely from the order for judgment and, as to the order for new trial, merely assert a procedural right to a conditional review thereof as incidental to the appropriate character of mandate issuable in the event of a reversal of the appealed judgment?

(3) When, after a verdict for plaintiff, defendant moves under Civil Procedure Rule 50 (b) for a judgment and, in the alternative, for a new trial, and the trial court enters judgment pursuant thereto and also grants the alternative motion for new trial for reasons which plaintiff desires to allege are merely supposed but not actual trial errors, does plaintiff, in an appeal from the judgment, have a procedural right to a conditional review of the grant of new trial as incidental to the appropriate character of mandate issuable in the event of a reversal of the appealed judgment?

(4) Assuming Question (3) to be answered in the affirmative, is not such plaintiff entitled to restoration of his verdict if, upon a review of the reasons underlying the grant of new trial as well as any alleged trial errors cross-assigned by the defendant, the appellate court decides the verdict to have been free from actual trial error harmful to defendant?

(5) Should the Court order full hearing and argument in this Court upon the merits of petitioner's appeal?

Reasons Relied Upon.

Petitioner relies upon the following reasons for the allowance of certiorari:

(1) The decision of the Circuit Court below to the effect that the appealed judgment does not exist is probably in conflict with the decision of this Court in *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, in exposition and construction of Rule 50 (b) of the Federal Rules of Civil Procedure.

(2) In deciding that petitioner had appealed from both orders of the trial court dated November 15, 1941, rather than only from the order for judgment with an assertion of a procedural right to an incidental review of the grant of respondent's alternative motion for new trial in the event of a reversal of the appealed judgment, the Circuit Court below decided an important question of Federal law in construction of Civil Procedure Rules 73 (a), 73 (b) and 75 (d), which has not been, but should be, decided in this Court.

(3) By its decision dismissing petitioner's appeal without deciding the merits of any of the questions therein involved, the Circuit Court below so far departed from the accepted and usual course of judicial proceedings in the cir-

cumstances of the appeal as to call for an exercise of this Court's power of supervision.

(4) Questions (3) and (4), as presented above, are of such importance to the public and to the profession as to call for their determination by this Court.

WHEREFORE, petitioner respectfully prays the Court to grant a review, on writ of certiorari, of the decision of the United States Circuit Court of Appeals for the Third Circuit in said case, being the case of County of Allegheny, Appellant, vs. Maryland Casualty Company, at No. 7962 in said court; and, further, to order full hearing and argument upon the merits of the questions involved in said appeal to the end that this litigation may be finally determined in this Court by such judgment as to right and justice may appertain; and for such other and further relief as the Court may deem meet and proper in the circumstances.

And petitioner will ever pray, etc.

COUNTY OF ALLEGHENY,
Petitioner,

By EDWARD G. BOTHWELL,
Attorney for Petitioner.

WALTER P. SMART,
Of Counsel.